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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

CRISTOBAL CARDONA, JOSE MARIA DE LA GARZA, PLACIDO RUIZ, AND JULIO RUIZ,
Petitioners

v.

ELLIOT C. RICHARDSON, Attorney General, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINION BELOW

The opinion of the court of appeals (App. B, *infra*, pp. 20-34) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, pp. 35-36) was entered on April 16, 1973. The order of the court of appeals denying respondents' Petition for Clarification and Rehearing (App. D, *infra*, pp. 37-38) was denied on May 22, 1973. On August 22, 1973, Chief Justice Burger extended the time of petitioners for filing a petition for a writ of certiorari to and including September 20, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Mexican aliens who commute daily to the United States to work and who do not maintain residences in this country when they return each evening to Mexico can enter the United States without immigrant visas on the ground that they are "returning resident immigrants" (8 U.S.C. 1181(b)) "returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)).

2. Whether such Mexican aliens are non-immigrants who cannot enter the United States to work unless no American labor is available because each has a "residence in a foreign country which he has no intention of abandoning" and "is coming temporarily to the United States to perform temporary services or labor" (8 U.S.C. 1101(a)(15)(H)).

STATUTES INVOLVED

8 U.S.C. 1101 provides in pertinent part:

§ 1101. Definitions.

(a) As used in this chapter—

* * * *

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * * *

(H) an alien having a residence in a foreign country which he has no intention of abandoning * * * (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country * * *.

* * * *

(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully

accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

* * * *

(27) The term "special immigrant" means—

* * * *

(B) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

* * * *

(33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

8 U.S.C. 1181(b) provides:

§ 1181. Admission of immigrants into the United States.

* * * *

(b) Readmission without required documents; Attorney General's discretion.

Notwithstanding the provisions of section 1182(a)(20) of this title in such cases or in such classes of cases and under such conditions as may be by regulations prescribed, returning resident immigrants, defined in section 1101(a)(27)(B) of this title, who are otherwise admissible may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation.

8 U.S.C. 1182(a)(14) provides:

§ 1182. Excludable aliens.

(a) General classes.

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to re-

ceive visas and shall be excluded from admission into the United States:

* * * *

(14) Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 1101(a)(27)(A) of this title (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in sections 1153(a)(3) and 1153(a)(6) of this title, and to nonpreference immigrant aliens described in section 1153(a)(8) of this title.

8 C.F.R. 211.1 provides:

§ 211.1 Visas.

* * * *

(b) *Aliens returning to an unrelinquished lawful permanent residence—(1) Form I-151, Alien Registration Receipt Card.* In lieu of an immigrant visa, an immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding 1 year may present Form I-151, Alien Registration Receipt Card * * *.

STATEMENT

Robert Bustos and Lupe Marquia, two California farm workers, and the United Farm Workers Organizing Committee, an organization of farm workers, filed a class action on December 1, 1969, in the United States District Court for the District of Columbia on behalf of all citizens and alien permanent residents of the United States engaged in farm labor in California. The complaint sought a declaratory judgment and injunctive relief against the practices of the Immigration and Naturalization Service in allowing Mexican aliens, who live in Mexico, to enter the United States daily or seasonally to perform agricultural labor. The complaint alleged that the Service—

(1) Violates the Immigration and Nationality Act of 1952, 8 U.S.C. 401, *et seq.*, and its own regulations by allowing such aliens (hereinafter described as "daily and seasonal commuters") to enter the United States with a Form I-151, a so-called green card, instead of an immigrant visa. The complaint alleged that the commuters could not use a green card because they are not "returning resident immigrants" (8 U.S.C. 1181(b)), are not an "immigrant lawfully admitted for permanent residence who is returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)), and are not immigrants "returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad" (8 C.F.R. 211.1(b)(1)). If the commuters may not enter pursuant to green cards, they can obtain an immigrant visa only if the Secretary of Labor certifies under 8 U.S.C. 1182(a)(14) that there are not sufficient workers in the United States willing to perform agricultural work and that their entry will not affect wages and working conditions of domestic workers. No such certification could be issued because the Secretary of Labor has determined that the supply of farm labor is sufficient and the admission of farm laborers would ad-

versely affect wages and working conditions of domestic workers. Schedule B, following 29 C.F.R. 60.6;

(2) Violates the Immigration and Nationality Act by considering commuters as immigrants rather than as non-immigrants "having a residence in a foreign country which he has no intention of abandoning * * * who is coming temporarily to the United States to perform temporary services or labor" under 8 U.S.C. 1101(a)(15)(H). If commuters are non-immigrants, they cannot enter the United States because Section 1101(a)(15)(H) allows entry only "if unemployed persons capable of performing such service or labor cannot be found in this country" and the Secretary of Labor has never issued such a certification for farm laborers in the western United States because no shortage of unskilled farm labor exists there;

(3) Violates the Service's regulations which prohibit commuters from acting as strikebreakers (8 C.F.R. 211.1(b)(1)) by allowing commuters to take employment at places where the Secretary of Labor has determined that a labor dispute exists merely because the commuter had previously worked for the same employer during a prior agricultural season.

On May 13, 1970, the district court granted the motion of the four petitioners, who are Texas farm workers, to intervene as plaintiffs on behalf of themselves and all farm workers in Texas. On June 8, 1970, the parties agreed to a stipulation of facts. On December 21, 1971, the district court granted without opinion the motion of the government for summary judgment, denied the motions of plaintiffs and plaintiff-intervenors for summary judgment, and dismissed the complaint (App. A, *infra*, p. 19).

On appeal, plaintiffs and plaintiff-intervenors renewed their arguments on all the claims described above. On April 16, 1973, the court of appeals held that, with re-

gard to daily commuters, "the statutory language is not as plain and unambiguous as plaintiffs contend. * * * [T]he concept of permanent "residence" can be taken to include the place of work of a daily commuter crossing international boundaries, in the same sense that a person commuting daily to his business in New York City, where he has a permanent commitment and interest in the on-going vitality and soundness of the city, and where he may have, for example, fraternal and cultural associations, may well consider himself a New Yorker even though his house in the suburbs is located in New Jersey or Connecticut" (App. B, *infra*, p. 32). The court said that since the practice began in 1927 and had continued for 45 years, and since Congress had never expressed any desire to change it, "it is fair to assume that the historic daily commuter practice known to Congress was expected to continue unchanged in the 1952 law" (*id.* at 31). The court therefore concluded that daily commuters were residents of the United States within the meaning of the Act and could continue to enter the country as immigrants using a green card.

In contrast, the court of appeals found that seasonal commuters are not "returning resident aliens" and therefore the entry of such aliens without immigrant visas "is in violation of the clear and plain language of the statute" (App. B, *infra*, p. 26). Moreover, since "[a]ll commuters who work as agricultural laborers only during the agricultural season provide only temporary services or labor," the court found that they came clearly within 8 U.S.C. 1101(a)(15)(H) which defines such persons as non-immigrants (*id.* at 27). The court concluded that, unlike in the case of daily commuters, the seasonal commuter system was created by the Service after 1964 even though Congress had both deliberately allowed the bracero program, which allowed the import of Mexican agricultural workers, to lapse and had strengthened the

Immigration Act of 1965 to safeguard American labor (*id.* at 23-25).

On April 30, 1973, petitioners filed a Petition for Clarification and Rehearing limited to two points. First, petitioners contended that commuters who come daily to the United States only during the agricultural season, rather than daily throughout the year to a permanent job, are properly considered as seasonal commuters under the court's reasoning and therefore could no longer enter the United States with a green card. Petitioners, however, asked that the position of these commuters be clarified since the court's opinion was not entirely clear. Second, petitioners asked that the court decide the contentions of the parties as to the Service's strikebreaker regulations which had not been decided or even addressed in the opinion.

On May 22, 1973, the court of appeals denied the motion (App. D, *infra*, pp. 37-38). However, the court explicitly did not determine the merits of the arguments advanced by petitioners. Instead, the court stated that "the application of the principles set forth in its opinion will remove, or at least modify, differences that may now exist between the parties on other matters initially in issue" and that "[i]f a controversy continues, it will be examined and decided in the light of our opinion, first by the district court, and if necessary by this court on appeal."

REASONS FOR GRANTING THE WRIT

1. The government has filed a petition for a writ of certiorari insofar as the court of appeals held that seasonal commuters are properly non-immigrants and, alternatively, even if they are immigrants, they cannot enter the United States pursuant to a green card without immigrant visas. No. 73-300. The farm workers have

filed a Brief in Opposition to that petition. As stated in the Brief in Opposition, we believe that review by this Court of the decision below is not warranted with regard to either daily or seasonal commuters. However, if the government's petition is granted as to seasonal commuters in No. 73-300, we submit that the issue of daily commuters should also be reviewed and that therefore this petition should be granted.

The alleged rights of daily and seasonal commuters to enter the United States pursuant to green cards are dependent on the identical statutory provisions and regulations. Much of the analysis of legislative history, administrative practice, and other materials is also relevant to both kinds of commuters. We therefore believe that, if review is to be granted as to any portion of the commuter practice, the entire issue should be before the Court.

2. The entry of daily commuters is of considerable more importance than of seasonal commuters. According to respondents' brief below, there are less than 8,300 seasonal commuters in comparison to over 45,000 daily commuters. Brief for Appellees, p. 3. These large numbers of daily commuters from Mexico cause unemployment and substantially lower wages for American workers in the towns along the border. Department of Labor, "The 'Commuter Problem' and Low Wages and Unemployment in American Cities on the Mexican Border," in *Report of the Select Commission on Western Hemisphere Immigration*, pp. 116, 123, 127-128 (1968).

3. Petitioners further submit that the decision below is incorrect.

The Act defines an immigrant as an alien who does not come within any of the ten specified categories of non-immigrants. 8 U.S.C. 1101(a)(15). One of the categories of non-immigrants is "an alien having a residence

in a foreign country which he has no intention of abandoning * * * (ii) who is coming temporarily to the United States to perform temporary services or labor * * *." 8 U.S.C. 1101(a)(15(H). This definition applies precisely to persons whose permanent homes are and continue to be in Mexico, who come to the United States only for a portion of each day to provide temporary labor, and have no home in the United States.

Even if daily commuters are deemed immigrants, they are required to enter the United States pursuant to a valid immigrant visa. The general rule is that immigrants may not enter the United States without immigrant visas (8 U.S.C. 1181(a)) which in turn requires certification by the Secretary of Labor that their entry will not cause injury to domestic workers (8 U.S.C. 1182(a)(14)). The Act provides an exception "in such cases or in such classes of cases and under such conditions as may be by regulations prescribed" for "returning resident immigrants, defined in section 1101(a)(27)(B)." 8 U.S.C. 1182(b). However, it is clear that daily commuters do not come within the exception on three distinct grounds.

First, daily commuters are not "returning resident immigrants." The Act defines "residence" to mean (8 U.S.C. 1101(a)(33)):

> the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

It is obvious that daily commuters, who by definition have their only home in Mexico and have no home in the United States (let alone a permanent one), have their "principal, actual dwelling place in fact" in Mexico and are not residents of the United States.

Second, daily commuters do not come within the definition of 8 U.S.C. 1101(a)(27)(B) because they are not

"lawfully admitted for permanent residence" and are not "returning from a temporary visit abroad." The Act defines "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. 1101(a)(20). While daily commuters were once lawfully accorded the privilege of residing permanently in the United States, their status has changed because they have not assumed residence in the United States. As Judge Eugene Wright demonstrated in his dissenting opinion in *Gooch* v. *Clark*, 433 F.2d 74 (1970), certiorari denied, 402 U.S. 955, any other interpretation of this definition of "lawfully admitted for permanent residence" "makes nonsense of the congressional policy embodied in no fewer than five sections of the Act [which also use this phrase] * * * and is entirely contrary to the plain meaning of two others." 433 F.2d at 83. In any event, a daily commuter entering the United States is not "returning from a temporary visit abroad"; on the contrary, since the daily commuter leaves his home in Mexico to come temporarily to the United States, his temporary visit abroad is from Mexico to the United States rather than from the United States to Mexico.

Third, 8 U.S.C. 1181(b) allows immigrants to enter the United States without immigrant visas only pursuant to regulations. The only applicable regulation is 8 C.F.R. 211.1(b)(1), which provides: "In lieu of an immigrant visa, an immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding 1 year may present Form I-151." This phrase—"unrelinquished lawful permanent residence in the United States after a temporary absence abroad" was no mere inadvertence since it is repeated seven additional times in 8 C.F.R. 211.1(b) and 211.2. It is obvious that a daily commuter who has

his only home in Mexico and comes to the United States only to work does not have an "unrelinquished" and "permanent" residence in this country.

The court below responded to the clear language of the statute and regulation with two arguments:

First, the court said that a person's place of work could be considered his place of residence (App. B, *infra*, p. 32). However, this is directly inconsistent with the definition of residence in the statute as "the place of general abode," as "his principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. 1101(a)(33).

Moreover, the Service has admitted that its practice of admitting daily commuters with a green card does not fit within any language of the Act. Charles Gordon, the General Counsel of the Immigration Service has testified that the commuter status is "a device of convenience," "never specifically * * * authorized by statute." Gordon, "The Amiable Fiction—Alien Commuters Under Our Immigration Laws," in Hearings on Employment of "Green Card" Aliens During Labor Disputes Before Special Subcommittee on Labor of the House Committee On Education and Labor, 91st Cong., 1st Sess. 181-182 (1969). He described the Service's practice as an "amiable fiction." *Id.* at 181, 186. Similarly, Gordon and Rosenfield in their treatise on immigration law state (*Immigration Law and Procedure*, Sec. 2.86):

> Where this employment [of Mexicans and Canadians] is permanent in character administrative ingenuity has devised a 'commuter' status, which enables the Canadian or Mexican to obtain lawful admission for permanent residence in order that he may be able to pursue his employment here, and his right to enter each day is attested by his alien registration receipt card. *Of course, this device is an amiable fiction, since the commuter is coming tempo-*

rarily and usually returns to his home in Canada or Mexico each night. [emphasis added]

In *Matter of H—— O——*, 5 I. & N. 716, 719, note 13 (1954), the Board of Immigration Appeals referred to "the fiction of a commuter's permanent residence coinciding with his place of employment * * *." Accord, *Matter of L——*, 8 I. & N. 643, 646 (1960); *Matter of J—— P——*, 9 I. & N. 591, 593-594 (1962); *Matter of Burciago-Salcedo*, 11 I. & N. 665, 667 (1966); *Matter of Gerhard*, 12 I. & N. 556, 557 (1967). Thus, the Immigration and Naturalization Service freely admits that the commuter practice is not authorized by any statute but was simply invented and continued to meet a need which the Service believed exists.

Second, the court of appeals said that the admission of daily commuters pursuant to a green card, unlike the admission of seasonal commuters, was based on a long-standing administrative practice which was well known to, and not changed by, Congress (App. B, *infra*, pp. 29-31).

While the court below correctly stated that the daily commuter practice began in 1924, it was of no importance until 1952. Since, prior to 1952, Mexican immigrants could readily obtain immigrant visas, the daily commuter system merely relieved them and the Service of the inconvenience of issuing an immigrant visa for each daily visit to the United States. In 1952, however Congress significantly limited the right of Mexican aliens to enter the United States by denying entry if the Secretary of Labor found that an economic threat would result, 66 Stat. 183. In 1965, Congress strengthened this provision by forbidding immigrants to enter unless the Secretary of Labor affirmatively determined that no threat to domestic labor existed. 8 U.S.C. 1182(a)(14).

Congress tightened the provisions relating to the entry of commuters in both the 1952 and 1965 Immigration

Acts. For example, while the Nationality Act of 1940 provided that "the place of general abode shall be deemed the place of residence" (Sec. 104), Congress defined "place of general abode" and therefore "residence" in the 1952 statute as the "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. 1101(a)(33).

Prior to 1965, the Act allowed the entry, without an immigrant visa, of "otherwise admissable aliens lawfully admitted for permanent residence who depart from the United States temporarily." 66 Stat. 181. This was changed in 1965 to its present wording of "returning resident immigrants, defined in section 1101(a)(27)(B)." 8 U.S.C. 1181(b).

The Committee Reports accompanying the 1965 amendments do not specifically discuss the reason for the change in the wording of Section 211(b). However, all of the 1965 amendments must be interpreted in the light of their stated purpose to provide (S. Rep. No. 748, 89th Cong., 1st Sess. 10 (1965); H. Rep. No. 745, 89th Cong., 1st Sess. 18 (1965)):

> Safeguards to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market.

The specific purpose of the amendment to Section 211(b) becomes clear from the hearings conducted on "commuter workers" by the House Committee on Immigration and Naturalization prior to the 1965 amendments as part of a comprehensive study of population and immigration issues. *Study of Population and Immigration Problems*, House Committee on the Judiciary, Subcommittee No. 1, Special Series No. 11 (1963). The Committee questioned the legality of the commuter practice and its adverse impact on the American economy. *Id.* at 166. During the course of the hearings, the Immigration Service relied on the pre-1965 version of 8

U.S.C. 1181(b) as the statutory basis for the commuter practice. L. Paul Winings, then General Counsel of the Service, insisted that it did not strain the language of that Section to call the commuter's absences from the United States "temporary departures." *Id.* at 169. He admitted, however, that the commuter practice did not fit within 8 U.S.C. 1101(a)(27)(B) which applies to "a temporary visit abroad." "One thinks of a visit as being, I presume, something away from a more permanent place." *Ibid.*

Walter Besterman, an authority on immigration law, who at the time of the 1963 hearings had been the Committee's legislative assistant for 17 years and who had been extremely influential in Congressional consideration of the 1952 Immigration Act, objected to this interpretation of the Act[1] (*id.* at 168-169):

> Is it your view of the very core of this problem that an immigrant who has not established permanent residence in the United States and is a commuter, in this class, is really complying with the law? Is his situation comparable to the status of the nonquota immigrant of the [8 U.S.C. 1101 (a)(27)(B)] class who is an immigrant lawfully admitted for permanent residence who is returning from a temporary visit abroad?
>
> I am asking this question because you [Mr. Winings] mentioned earlier the situation of an immigrant who came here from overseas, established a residence but left his family behind and is going abroad to visit that family. That person would be, in my opinion, a returning immigrant when he comes back, regardless how often he makes the trip. But what is different is the commuter who has not established residence here and therefore is not returning thereto.

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[1] Besterman, as the record of the hearings demonstrates, was speaking on behalf of the Subcommittee. *Id.* at 166, 167.

Besterman ended the Committee's examination of the legality of the commuter practice by tersely stating, "I do not want to prolong that. I think the facts are before the subcommittee." *Id.* at 169. The Committee responded to the Immigration Service's statutory defense of the commuter practice by removing the phrase which the Service relied upon to justify the admission of daily commuters without an immigrant visa and replacing it with a reference to another provision which the General Counsel of the Service admitted did not cover daily commuters. H.R. 2580, Sec. 9, in H. Rep. No. 745, 89th Cong., 1st Sess. 6 (1965).

This Court has generally looked with disfavor upon the proposition that reenactment of a statute constitutes legislative adoption of its administrative construction. *E.g., Commissioner* v. *Glenshaw Glass*, 348 U.S. 426, 431 (1955); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47-48 (1940). As the Court stated in *Helvering* v. *Hallock*, 309 U.S. 106, 119-120, 121 (1941):

> To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities.
>
> * * * *
>
> Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.

Here, where the language of the statute and regulations are clear, where the Congress did not simply pass the statute but significantly tightened its provisions, where Congress' basic purpose was to protect American labor, and where the only legislative history indicates that Congress disapproved the commuter practice, there is no basis for concluding that Congress intended to approve the admission of daily commuters without immigrant visas.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be granted if this Court grants a writ of certiorari in No. 73-300.

Respectfully submitted,

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SEPTEMBER 1973